Supreme Court, U.S.
MAY 22
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. [redacted] 66

THE NORTH ARLINGTON NATIONAL BANK,
Petitioner,

vs.

KEARNY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[redacted] Hamilton, Jr.,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinion below	1
Jurisdiction	2
Question presented	2
Subordinate question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4

Table of Cases Cited

Bullard v. *National Eagle Bank*, 85 U. S. 589, 21 L. Ed. 923	7
City of Yonkers v. *Downey*, 310 U. S. 656, 60 S. Ct. 1071, 84 L. Ed. 1420	7
Fahey v. *Mallonee*, 332 U. S. 245, 91 L. Ed. 2030	5
First National Bank in St. Louis v. *Missouri*, 263 U. S. 640, 68 L. Ed. 486	5
Logan County National Bank v. *Townsend*, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496	7
Maher v. *Reis*, 46 N. Y. Supp. (2), 182 Misc. 837	6
Rushton v. *Michigan National Bank*, 298 Mich. 417, 299 N. W. 129	16

Statutes Cited

Home Owners Loan Act of 1933, 12 U.S.C.A. Section 1461-1468	2
12 U.S.C.A. 36	10, 13, 17
12 U.S.C.A. 1464(a)	14
12 U.S.C.A. 1464(e)	14
12 U.S.C.A. 1465	14
28 U.S.C. 1254(1)	2

Other Authority Cited

Cong. Record V. 75, pp. 9711, 9890	16
Cong. Record V. 76, p. 1997	17
Cong. Record V. 77, p. 5781	17
Cong. Record V. 77, p. 5895	17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 748

THE NORTH ARLINGTON NATIONAL BANK,
Petitioner,

vs.

KEARNY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on February 28, 1951.

Opinions Below

The opinion of the District Court (R 37) is reported in 92 F. Supp. 481. The opinion of the Court of Appeals (R 44) is reported in 187 F. (2) 564.

Jurisdiction

The judgment of the Court of Appeals was entered on February 28, 1951. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

1. Whether a federal savings and loan association organized pursuant to the provisions of the Home Owners Loan Act of 1933, 12 U.S.C.A. Section 1461 et seq., may lawfully conduct its business through a branch.

Subordinate Question Presented

In the event that certiorari is granted, petitioner reserves the following question, decided adversely to petitioner in the District Court, but assumed arguendo in petitioner's favor by the Court of Appeals:

2. Whether a national banking association may maintain an action for declaratory judgment against a federal savings and loan association, declaring the operation of a branch by such association to be unlawful, and for an order enjoining the operation of such a branch.

Statute Involved

The pertinent statute involved is the Home Owners Loan Act of 1933, 12 U.S.C.A. Section 1461-1468

Statement

Petitioner is a national bank doing a general banking business in North Arlington, Bergen County, New Jersey, where it has been in business for the past 28 years.

Respondent is a federal savings and loan association, chartered under the Home Owners Loan Act of 1933. By the terms of its original charter it was authorized to operate its business in the Town of Kearny, Hudson County,

New Jersey, a different community and county from that wherein petitioner has conducted its business.

In September, 1948, respondent applied to the Home Loan Bank Board for permission to open a branch office in North Arlington at a location one-half mile from the petitioner's bank. On February 28, 1949, the Home Loan Bank Board approved this application. On April 1, 1949, petitioner, upon receiving notice of such action petitioned the Board to rescind its approval thus given. This request was denied by the Board on May 27, 1949.

On May 31, 1949, petitioner instituted this action in the Superior Court of New Jersey, Chancery Division, seeking to obtain a declaratory judgment decreeing that the respondent had no authority in law to conduct its business through a branch office and seeking also an order enjoining the operation of the branch in question.

On respondent's application, the cause was removed to the United States District Court in and for the District of New Jersey.

Thereupon, petitioner moved for summary judgment on the ground that there was no genuine issue as to any material fact and that petitioner was entitled to judgment as a matter of law. Respondent at the same time moved for a dismissal of the complaint, and both motions were consolidated for hearing and argument. After such hearing the District Court dismissed the complaint, granting respondent's motion and denying that of the petitioner.

The basis of the District Court's opinion (R 37) was that petitioner, as a competitor of the respondent, had no standing to challenge the authority granted to respondent to operate its branch nor to challenge the respondent's operation of a branch office. The District Court stated:

"such an action is reserved to the government in an

The statement on line 5 was printed in error. Actually, respondent's branch is located a few doors from petitioner's

haps an attack may be made by a party having an interest in the loan association on the ground of ultra vires."

No determination was made by the District Court as to the question whether a federal savings and loan association might lawfully maintain a branch.

On appeal, the Circuit Court assumed without deciding, that the petitioner had sufficient standing to bring the action and to question the legality of respondent's acts, but concluded on the main question that respondent's establishment of a branch office in this case was lawful. The judgment below was therefore affirmed.

The opinion of the Circuit Court (R 44) recognizes that there is no express authority to be found in the Home Owners Loan Act giving to federal savings and loan associations the power to establish branches or branch offices.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that a federal savings and loan association organized pursuant to the Home Owners Loan Act of 1933 may lawfully conduct its business through a branch office.

2. In determining that such authority may be implied from the provisions of the Home Owners Loan Act of 1933 although no express authority is therein granted.

3. In failing to decide, although assuming the point arguendo, that a national banking association has standing to question the legality of the operation of a branch office by a federal savings and loan association.

4. In affirming the judgment of the District Court.

Reasons for Granting the Writ

1. The decision of the court below conflicts with two decisions of the United States Supreme Court.

The court below decided that the Home Owners Loan Act gives the Home Loan Bank Board authority to create branch offices for federal savings and loan associations. This decision was rendered despite the fact that the Act does not expressly grant such authority to the Board. In fact the Act does not mention branch offices. This decision conflicts in principle with the decisions of this Supreme Court in *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640, 68 Law Ed. 486 (1924) and *Fahey* v. *Mallonee,* 332 U.S. 245, 91 Law Ed. 2030 (1946).

In *First National Bank in St. Louis* v. *Missouri,* the State of Missouri brought a quo warranto proceeding in the state court against the First National Bank in St. Louis to determine its authority to establish and conduct a branch bank in the City of St. Louis. The State contended that the establishment and operation of the branch bank was in violation of a state statute expressly prohibiting the establishment of branch banks. At the time the matter arose, the National Banking Act set forth certain powers of national banks and also stated that such a bank was vested with "all such incidental powers as shall be necessary to carry on the banking business". The Act, however, contained no explicit authority permitting a bank to establish a branch. The Missouri Court held that the operation of the branch bank by the defendant was contrary to the state statute and granted the relief sought by the plaintiff.

Thereafter the United States Supreme Court upheld the decision of the state court. In so doing, the Supreme Court decided that under the National Banking Act there was no express or implied authority for a national bank to establish or operate a branch office and that the establishment or operation of such a branch was not an incidental power of a bank. The Supreme Court held that in the

absence of an express statutory provision in the National Banking Act a national bank could not establish or operate a branch.

It should be noted that the Supreme Court reached this conclusion in spite of a statutory grant of "all such incidental powers as shall be necessary to carry on the business of banking." The Home Owners Loan Act of 1933 makes no such grant of incidental power and thus presents an even stronger argument against the existence of an implied right to establish and operate a federal savings and loan association branch.

In *First National Bank in St. Louis* v. *Missouri,* the construction of the National Banking Act was involved while in this matter we are concerned with the construction of the Home Owners Loan Act. However, in principle a federal savings and loan association bears a very close resemblance to a national bank, a resemblance which has consistently been recognized by the courts. In *Maher* v. *Reis,* 46 N.Y. Supp. (2) 546, 182 Misc. 837 Justice McLaughlin stated:

> "The subject institution is a federal savings and loan association. As such, it has the character of a national bank."

The fact that one is a national bank while the other is a federal savings and loan association in no way alters the application of that decision to this case. Both are financial institutions. Both are creatures of federal legislation. Both depend upon federal law for their existence and powers.

In *First National Bank in St. Louis* v. *Missouri,* the United States Supreme Court laid down the principle that there must be express statutory authority for the establishment of a branch of a federally created financial insti-

tution. This decision was in keeping with the numerous cases which hold that national banks may only exercise such power and authority as has been granted to them by federal statutes. *Bullard* v. *National Eagle Bank* (U.S. Ct., 1874) 85 U.S. 589, 21 Law Ed. 923; *Logan County National Bank* v. *Townsend* (U.S. Ct., 1891) 139 U.S. 67, 35 Law Ed. 107, 11 Sup. Ct. Rep. 496. This opinion was also consistent with the cases holding that powers not conferred by Congress are denied. *City of Yonkers* v. *Downey,* N.Y. 1940, rehearing denied 1940, 60 S. Ct. 1071, 310 U.S. 656, 84 Law Ed. 1420. The court below has decided that such express statutory authority is not necessary for the establishment of a branch office of a federal savings and loan association. We respectfully submit that the court below has rendered a decision in conflict with the decision of the United States Supreme Court in *First National Bank in St. Louis* v. *Missouri.*

The court below has distinguished the case of *First National Bank in St. Louis* v. *Missouri,* supra, by stating that the analogy between a federal savings and loan association and a national bank is not helpful in this matter.

The court below has in effect distinguished a federal savings and loan association from federally created banks. On this point the opinion conflicts in principle with the case of *Fahey* v. *Mallonee,* supra. That case involved an action by the shareholders of a federal savings and loan association to oust a conservator appointed by the Home Loan Bank Commissioner. The proceeding was against the conservator, the Chairman of the Home Loan Bank Board and others, and was heard in the District Court before three judges. The decision of the lower court resulted in the ousting of the conservator on the ground, among others, that Section 5 (d) of the Home Owners Loan Act as amended, was unconstitutional.

The matter was then brought before the United States Supreme Court which reversed the decision below and held that the section in question was constitutional. The Supreme Court reached its decision on the constitutionality of the section by drawing an analogy from banking statutes and regulations. The fact that this decision was based on such an analogy becomes apparent if one considers the language of the opinion presented by Mr. Justice Jackson:

> "The provisions are regulatory. They do not deal with unprecedented economic problems of varied industries. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. * * *
>
> The Board adopted rules and regulations governing appointment of conservators. They provided the grounds upon which a conservator might be named, and they are the usual and conventional grounds found in most state and federal banking statutes. They are sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review if there should be a proper occasion for it. * * *
>
> But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is unconstitutional."

This decision of the United States Supreme Court was based upon accepted banking principles and was reached in view of that court's experience in the interpretation of banking statutes. The court clearly shows that the Home Owners Loan Act is to be construed as a federal banking statute in accordance with established banking practices. It points out that federal savings and loan associations are to be regarded as banking institutions.

The court below has failed to follow the opinion of the United States Supreme Court in the *Fahey* case. It has looked upon the federal savings and loan association as some sort of thrift institution not having the scope of banks. The court below has not construed the Home Owners Loan Act in accordance with banking practices and federal banking statutes. We respectfully submit that the court below has rendered a decision in conflict in principle with the decision of this court in *Fahey* v. *Mallonee,* supra.

2. Clearly the question presented is one of considerable importance, not only to the administration of the Home Owners Loan Act, but to the fundamental operation of the federal savings and loan system. The decision is not merely of primary consequence to the particular parties here involved, nor does it turn upon the operation of this one branch alone. It affects all federal savings and loan associations, all national banks, and all other state and federal banking institutions as well. It concerns a basic and far reaching exercise of power by the Home Owners Loan Board, admittedly not expressly granted by the statute, and it directly bears upon the financial structure, and therefore the economy, of the nation. The settlement of this question by this court is plainly in the public interest.

The decision under review would grant to federal savings and loan associations a power denied by Congress to national banks. National banks, under present statutes, may

establish branches only where state laws give such right to state institutions, and then, subject to the other limitations placed on branch banking by the states. 12 U.S.C.A. 36. Under this decision of the Court of Appeals federal savings and loan associations would be permitted to establish branches without regard to limitations placed upon state savings and loan associations by states, thus even transcending state lines. As a result of this decision they would be free from all of the restrictions placed upon the branch operations of national banks by the Congress.

The history of the National Banking System indicates the extreme reluctance on the part of the Congress to sanction the operation of national banks through branches or branch offices. Where they have been permitted the Congress has been careful to surround their operation and administration with adequate and specific safeguards for the protection of the public.

A federal savings and loan association is no less a banking institution (*Fahey* v. *Mallonee*, supra) having the character of a national bank. The public is as vitally concerned with the operation of a federal savings and loan association, as it is with a national bank.

The decision below will most certainly encourage a general organization of branches by all federal savings and loan associations, which would seriously interfere with the policies and safeguards heretofore set up to safeguard our national and state banking systems.

The right of federal savings and loan associations to establish branch offices is not only a matter of the greatest importance to other state and federal banking institutions, but is, moreover, a matter peculiarly affecting the public interest.

3. The decision of the court below is believed to be erroneous in principle, and the conflicting decision of this court in *First National Bank in St. Louis* v. *Missouri*,

supra, correct in principle. In substance, this court in the Missouri case has held that the power of a national bank to establish a branch must rest upon express statutory authority and will not be implied in the absence of such express authority. The lower court in the instant case has determined that such a power in a federal savings and loan association will be implied, where admittedly there is no express statutory grant of the power.

Not only is the decision of the Court of Appeals a distinct departure in principle from the prior pronouncement of this court, but the language of the statute affords no basis for the implication of power which the lower court finds to exist. Moreover, the history of banking legislation in the Congress indicates that the establishment of branches by savings and loan associations was never intended.

The effect of the opinion here under review would be to countenance a third system of banking in the United States, operating through branches, and transcending state lines, to take its place beside our National and State Banking Systems. This Congress never intended.

A savings and loan association has all the characteristics and attributes of a bank. (Cf. *Fahey* v. *Mallonee*, supra and *Maher* v. *Reis*, supra.)

The respondent, in its branch, maintains savings accounts, Christmas Club accounts, pays interest on savings, grants Title I FHA home improvement loans, lends money on conventional mortgage loans, veterans loans, and FHA loans,—in short everything that the petitioner does except to handle commercial deposits and to make commercial loans.

It is a banking institution, as this court has recognized in *Fahey* v. *Mallonee*, supra,—as much so as a national bank. Therefore the analogy between this court's decision

in *First National Bank in St. Louis* v. *Missouri*, supra, and the facts at bar, becomes apparent.

What did Congress intend in enacting the Home Owners Loan Act, and in creating federal savings and loan associations? This was emergency legislation, designed to meet an existing situation, and unquestionably not intended to create a new banking system.

The primary reason for the Act, was to afford immediate relief to home owners whose homes had been financed through the old type building and loan associations and who faced foreclosure by such associations. Another factor of equal importance was the rehabilitation of the then almost moribund building and loan associations. But very apparently it was the design of the act to retain the small, local character of the building and loan association, and not to supplant it with a new banking system having a greater latitude with respect to branch operations by national banks or state banks.

Building and loan associations historically were local neighborhood associations managed and controlled by persons living and working in the immediate neighborhood. More often than not, the office of the association was in the rear of a local real estate office or similar establishment, and the association was designed to serve the people residing in the small geographical area in which the office was located. Branches were neither necessary nor desirable, nor were they ever contemplated under the building and loan system, since the essential nature of these associations was the direct managerial and administrative control through officers and directors in immediate contact with the people whom they served. This the one central office provided and this, the establishment of branches would have destroyed.

In enacting the Home Owners Loan Act, there is every reason to believe that Congress fully intended to preserve

this local character and central managerial control of the old building and loan associations, when it authorized the creation of the new federal savings and loan associations. Congress never intended to grant the power to conduct the business of these associations through branches, for to do so would be to destroy the local character which this system of local home financing was designed to perpetuate. Under the construction given to the Act by the court below, it would be possible for a savings and loan association with an office in one state, to have such number of branches as the Board might allow, in one or more other states. A New York association might have branches in New Jersey and Connecticut and in other states. Yet a national bank is limited in having branches to the state, and usually to the municipality where its main office is located. 12 U.S.C.A. 36.

In New Jersey, state savings and loan associations are not permitted branches, except through merger or consolidation. Yet under the decision of the court below, a federal savings and loan association with offices there may have any number of branches.

In New Jersey also, a national bank may have branches only within the municipality where its main office is located, unless they are acquired through mergers or consolidation, in which case the limitation is to the county in which the main office is located. Yet under the decision here under review, a federal savings and loan association with its main office in the central part of the state might have branches in almost every county of the state—and outside the state as well.

These limitations, on national and state banks, were deliberately and carefully developed for the adequate protection of the public, and a sound administration of our banking systems. They represent the policy and the intention of Congress as to the development of any system of

banking national in scope. The federal savings and loan associations were not intended to be national in scope, or Congress would have fixed the same safeguards applied to national banks. The real intent of the Act was to preserve the local character, peculiar to the old building and loan institutions, as they existed in 1933.

The express wording of the Act 12 U.S.C.A. 1464, subsection (e) provides as follows:

> "No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home financing institutions."

Other sections of the Act emphasize the intent of Congress to provide for local institutions serving a local community with local and direct management and control. The language used in 12 U.S.C.A. 1464, subsection (a) and 12 U.S.C.A. 1465 conclusively indicates this to be so:

> "In order to provide *local* mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of *local* mutual thrift and home-financing institutions in the United States."
>
> "To enable the Board to encourage *local* thrift and *local* home financing and to promote, organize and develop the associations herein provided for * * * there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated,

> the sum of $150,000 * * * The sums appropriated and made available pursuant to this section shall be used impartially in the promotion and development of *local* thrift and home-financing institutions, whether State or Federally chartered."

These and other provisions of the statute, coupled with the complete absence of any provisions for the creation of branches, or any directions for the safeguarding of branch operations, make it apparent that the language used not only negatives any intention on the part of Congress to permit branches, but is an express prohibition against such associations operating through more than one office. The purpose of the Act was to create single unit local mutual thrift institutions, and the present attempt at branch operations is without authority in law.

Nor is the Court of Appeals correct in assuming that "There is no danger of any single (federal savings and loan) association becoming a giant monopoly". Already, these associations are far removed from the neighborhood building and loan association. The association in *Fahey* v. *Mallonee*, supra, possessed assets of $26,000,000—which by comparison, is small in size to many. If multiple branches are sanctioned, transcending state lines, monopolistic tendencies are possible. More important, the safeguards to the public which Congress intended should accompany banking of this scope, are nullified.

The Congressional history of this Act likewise indicates that Congress had no intention to permit the operations of branches by federal savings and loan associations. After the decision in the *First National Bank in St. Louis* v. *Missouri* case, supra, Congress enacted a statute governing the establishment of branches by national banks. This was the McFadden Act which provided that national banks would be permitted to open branches only where the same

right was given under state law to state banks in the state where the national bank is located.

The enactment of the McFadden Act and its subsequent amendment in 1932 was preceded by Congressional hearings which make it apparent that Congress was not only most reluctant to authorize blanket authority for the establishment of branches, but was most zealous in establishing safeguards for their operation. It should be carefully noted that these discussions took place immediately before the adoption and passage of the amendment to the McFadden Act in 1932, and that the Home Owners Loan Act was passed in 1933, when most of the Congressmen who took part in the discussions of 1932 were still members of Congress.

The McFadden Act passed in 1927 was, as we have stated, amended in 1932. See *Rushton* v. *Michigan National Bank* (Sup. Ct., Mich. 1941, 298 Mich. 417, 299 N.W. 129.) The 1932 amendment as originally introduced intended to amend the law so as to authorize state wide branch banking, without regard to state laws or policies. See Cong. Record V. 75, pp. 9711, 9890. This amendment as originally proposed met with overwhelming opposition on the ground that it would constitute "an invasion of the sovereign rights of the State" for the federal government to establish within their borders a species of banking not sanctioned by the local policy. It was apparent from the objections of the members of Congress that most states did not permit branch banking.

An amendment was therefore offered by Senator Bratton, which would authorize branch banks only when "permitted to state banks by the law of the state in question." Even this amendment did not satisfy Congress, and, on suggestion from Senator Wheeler, the word "permitted" was changed to "authorize." Senator Wheeler explained his

request (Cong. Record V. 76, p. 1997) on the theory that the amendment might be construed to permit branch banking in states where the state law was silent on the question of branch banking. The Congressmen were so concerned with this possible invasion of state's rights that the bill was rewritten by the conference committee (Cong. Record V. 77, p. 5781) so as to authorize such branches * * * "if such establishment and operation are at the time authorized to state banks by the statute law of the state in question by language specifically granting such authority affirmatively and not merely by implication or recognition."

Mr. Luce, a House conferee, made the following explanation of the final form of the amendment (Cong. Record V. 77, p. 5895):

> "It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail."

Such was the thought and intent of Congress in enacting the McFadden Act and such is the intent of Congress today since this law has never been changed.

The fact that the Home Owners Loan Act of 1933 contained no safeguards on branch operation becomes important, in connection with a determination of the issues here presented, will be realized upon an examination of the provisions of the national banking laws dealing with the establishment of branches. 12 U.S.C.A. 36. In addition to the requirement that national banks may have branches in a particular state only when the law of such state expressly authorizes state chartered banks to operate branches, Con-

gress also established certain capital requirements and outlined safeguards which limit branch privileges for national banks. Such limitations are based on geographical, numerical and capital requirements and are of the same general type established by various state legislatures. To hold that Congress intended to permit federal savings and loan associations to establish branches without any legislative limits would be to fly in the face of a well developed federal policy against such procedure. We emphasize again that, since the Home Owners Loan Act does not set forth any limitations for the control of branches of federal savings and loan associations, Congress did not intend to grant the privilege of branch operation to such associations.

The Court of Appeals, however, based its conclusion that an implied power existed on the part of the Board to establish branch offices for a savings and loan association, from language contained in Section 1464 (a) of the Act. By this section, the Board was authorized to issue charters for federal savings and loan associations, "giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States." But this power is quite apparently limited to the authority of the Board to grant charters in the initial instance. There is no warrant for supposing that Congress thereby meant to authorize the creation of branches as the lower court finds.

We submit further that no great weight should be given to the interpretation by the Home Owners Loan Board of its own authority, under the theory set forth in the opinion below, that the contemporaneous interpretation of the statute by the authorized administrative agency may be considered in determining what the powers are. In the final analysis, the power of the Board can rise no higher than the authority granted by the statute, and the interpretation

given by the Board cannot create a power or an authority which does not exist and was never intended.

The express purpose of the provisions of the Act cited herein, was to provide for "local mutual thrift institutions." The express language of the Act indicates that such an association should serve but one local community in the same sense that such communities were served by the predecessor building and loan assaciations. Moreover, the Act contains no provision whatsoever for the establishment of branches, no provisions setting up customary safeguards or limitations on the establishment or administration of branches. For these reasons, it is submitted, the decision of the Circuit Court of Appeals is erroneous and that it conflicts in principle with the well established policy of this court as set forth in the *First National Bank in St. Louis* v. *Missouri* case, supra, and in *Fahey* v. *Mallonee,* supra.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRED HERRIGEL, JR.,
Counsel for Petitioner.

Dated: May , 1951.